

Office of Legislative Counsel

31 March 1978

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Honorable Alan K. Campbell, Chairman
United States Civil Service Commission
Washington, D.C. 20415

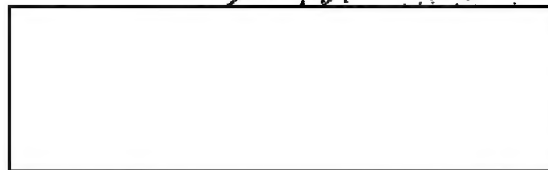
Dear Mr. Campbell:

It is understood that it is the position of the Administration to support a complete exemption from the Civil Service Reform Bill (H.R. 11280 and S. 2640) for the Central Intelligence Agency as discussed between you and Mr. John F. Blake, the Agency's Deputy Director for Administration, on 27 February 1978, representatives of our respective staffs and representatives of OMB.

In connection with your testimony on H.R. 11280 before the House Post Office and Civil Service Committee scheduled for 4 April 1978, it would be deeply appreciated if you would support this CIA exemption. Enclosed for your consideration is a short statement setting forth the rationale and justification for such an exemption.

Following your presentation, it would be our intention, in collaboration with your staff, to work with the staff of the House Post Office and Civil Service Committee on the specific language necessary to implement the Administration's position with respect to this matter. In this connection, also please find enclosed a copy of our views letter to OMB and a response to certain questions which have been raised by your staff.

Sincerely,



Acting Legislative Counsel

STATINTL

Enclosures

cc: NSA

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OLC:YTF:SKM (31 Mar)

It is intended that the CIA and the other entities of the Intelligence Community be exempted from the provisions of the Civil Service Reform Bill; this position is in accord with the Administration's program. Such exemption is based essentially on security reasons, that is, because of the need to maintain secrecy and security regarding intelligence activities and functions, and because of the special personnel requirements of intelligence agencies which demand maximum flexibility.

The administration of the Central Intelligence Agency is governed by the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. The former imposes on the Director of Central Intelligence responsibility for protecting intelligence sources and methods from unauthorized disclosure (50 U.S.C. 403). It also grants the Director the discretion to terminate the employment of any officer or employee of the Agency "whenever he shall deem such termination necessary or advisable in the interests of the United States" (50 U.S.C. 403). The Director of the National Security Agency has similar termination authority (50 U.S.C. 333). These statutory authorities are considered to be absolutely essential in the management of our foreign intelligence efforts.

As I noted before, the intent was to exclude from coverage the Intelligence Community. However, there are provisions in the bill which require modification in order to reflect fully this intent. As to these sections, we will be offering amendatory language so that the bill is in conformity with the Administration's position.

SUMMARY

On 3 March 1978, the Civil Service Reform Bill (H.R. 11280 and S. 2640) was introduced in Congress. The bill would effect a major reform of the Civil Service system. The thrust of the bill appears to strengthen individual agency responsibilities and authorities.

The CIA fully supports the spirit and intent of the proposed changes in the Civil Service system. Indeed, as an administrative policy we have always followed the basic philosophy of the merit system. However, a complete exemption from the coverage of the bill is necessary because of our need to maintain secrecy and security regarding intelligence activities and functions, and because of our special personnel requirements which demand maximum flexibility.

The procedures and mechanism established by the bill to implement the merit system principles would conflict with the statutory responsibilities of the Director of Central Intelligence to prevent disclosure of sources and methods (50 U.S.C. 403(d)(3) and 403g), with the Director of Central Intelligence's termination authority (50 U.S.C. 403(c)), and with the unique statutory expected status of CIA personnel (50 U.S.C. 403j).

Because this legislation is so complex and comprehensive, the exemptions covering the Agency and the other entities of the Intelligence Community should be clearly drawn and written.

1. Title I, Merit System Principles

In Title I, the CIA and other entities of the Intelligence Community are exempt from only proposed section 2301 (section 101(a) of the bill, which would amend Title 5, U.S.C.), the Merit System Principles, but not from the other two sections, Prohibited Practices and the GAO audit. As noted in our report on the draft bill, submitted to OMB on 17 February 1978 and herein attached as Appendix B, it is necessary that the CIA and other intelligence entities be exempt from all of Title I.

A complete exemption from all of Title I would exempt the CIA and the other entities of the Intelligence Community from the provisions referring to the Special Counsel in Title II (sections 1201 to 1207 amending Title 5 of the U.S.C.) which authorize the Special Counsel to investigate allegations of prohibited personnel practices described in Title I.

It is therefore proposed that section 2101(a)(2) be amended to read:
"(2) This chapter shall not apply to --"

2. Title II, Civil Service Functions; Performance Appraisal; Adverse Actions

In Title II, the CIA is explicitly exempted from Chapter 43, Performance Appraisal, and from Subchapter I of Chapter 75 relating to short-term suspension (sections 203(a) and 204(a) of the bill which would amend Title 5, United States Code).

As for the provisions of Subchapter II, which involve Removal or Suspension for more than 30 days (sections 7511-7514), it should be noted that CIA is exempt from such provisions because of the nature of its excepted personnel system (50 U.S.C. 403j). Though this Subchapter applies to preference eligibles serving in the excepted service generally, the broad scope of the statute which governs CIA's excepted status has been universally interpreted as excepting the Agency from all laws regarding preference eligibles.

Chapter 77, Appeals, would present no conflict for CIA if the Agency were completely exempted from the provisions of the bill. Presently, the Agency is exempt from various statutes which give the Civil Service Commission its adjudication and appeals authority and its authority to promulgate rules and regulations. The adjudication and appeals authority of the CSC would be passed, as is, from the CSC to the new Merit Board pursuant to a presidential reorganization. However, our statutory exemptions from such adjudications and appeals would remain in effect. The only statutory basis for any new rights

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of appeal to the Merit Board would be this bill; thus, we require a complete exemption from this bill.

3. Title IV, Senior Executive Service

Regarding Title IV, the only exemption provided the CIA is unacceptable. As this title is drafted, the CIA would have to seek exemption under the general exemption provisions of subsection (c). These provisions would require CIA to make a presentation to Office of Personnel Management, in support of the Agency's request for exemption. Moreover, OPM is given the authority to conduct any independent investigation it deems appropriate, before it makes its recommendation to the President on whether the Agency should be exempted from the Senior Executive Service. If the Agency is exempted by subsection (c), it still must attempt to make its personnel system conform to SES as much as possible. Finally, OPM is given the authority to recommend the revocation of a subsection (c) exemption at any time. The prominent role to be played by OPM in the process of allocating and policing subsection (c) exemptions would necessarily require detailed examination by OPM of the personnel systems exempted or seeking exemption under subsection (c).

CIA must be specifically by name exempted from Title IV, as well as from the other titles of the bill, in order to preserve the secrecy and security required by the Agency's mission and functions. Though the drafters of the bill decided that CIA did not need a specific exemption from Title IV because it could be exempted under subsection (c), the detailed examination of the Agency's personnel system that would result from the Agency having to obtain a subsection (c) exemption would itself defeat the entire purpose behind CIA receiving an exemption in the first place. In short, we regard a subsection (c) exemption as tantamount to no exemption at all.

4. Title V, Merit Pay

Neither the CIA nor any other entity of the Intelligence Community is exempted from Title V, which concerns Merit Pay. This title would result in OPM control and regulations which would conflict with the Director's statutory responsibility to prevent disclosure of sources and methods (50 U.S.C. 403(d)(3) and 403g). Furthermore the title would abrogate the Director of Central Intelligence's authority to establish pay systems to meet the operating requirements of the Agency. (5 U.S.C. 5101 et seq.) We, therefore, propose the following amendment to section 5402(a):

"(a) In accordance with the purposes set forth in section 5401 of this title, the Office of Personnel Management shall establish a merit pay system which shall cover any employee in a position which regularly requires the exercise of managerial or supervisory

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responsibilities and which is in GS-13 through GS-15, but which shall not cover employees of Central Intelligence Agency, Defense Intelligence Agency, and National Security Agency, and any executive agency or unit thereof, designated by the President, that conducts foreign intelligence or counterintelligence activities."

5. Title VI, Research, Demonstration, and Other Programs

The language which apparently is intended to exempt CIA from Title VI is not drawn as clearly as we believe necessary. In our view, every effort should be made to provide the clearest possible provisions concerning the scope of this legislation. We, therefore, propose that CIA be exempted from Title VI specifically by name rather than by reference.